In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-671

JOSEPH GANIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) erroneous testimony adduced on two counts of a multi-count indictment tainted his conviction on another count and (2) the government's dismissal of several counts of the indictment at the beginning of trial denied him due process of law.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on three counts of preparing fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The district court granted petitioner's motion for a new trial as to two of the counts, but imposed a fine of $1,000 on the remaining count (Pet. App. B). The court of appeals affirmed (Pet. App. C).

1. Petitioner, the manager of an income tax return preparation service, was charged with having claimed various tax deductions on behalf of taxpayers Ludwik Dominiak,

Sarah Coleman, and Hector Burgos, to which they were not entitled. Specifically, the Dominiak return for 1972 (G.X. 1)[1] claimed a $192 deduction for union dues, although the taxpayer had never belonged to a union (Tr. 14-15), and it substantially overstated his expenses for medical insurance premiums and work-related safety equipment (Tr. 15-16, 27). Dominiak testified that he did not authorize these deductions, that he had signed the return without having checked petitioner's calculations, and that petitioner did not provide him with a copy of his completed return until eight months after the return had been filed (Tr. 15-17, 25, 33).

The Coleman returns for 1971 and 1972 (G.X. 2, 3) listed substantial deductions for state and local gasoline tax payments. Coleman testified that she did not own a car and had not purchased gasoline during the years in question, that she had explicitly reported these facts to petitioner, and that she had signed the return without reviewing its contents because of her confidence in petitioner (Tr. 36-37, 44). In addition, Coleman stated that the gasoline tax deduction did not appear on the copy of her 1972 tax return that she had received from petitioner (Tr. 40).

The 1972 Burgos return (G.X. 5) claimed deductions for union dues, work clothes, and medical insurance premiums. Although Burgos testified that he did not authorize petitioner to enter the deductions in the amounts claimed (Tr. 55-57), he stated on cross-examination that he did belong to a union, that he had incurred medical insurance and work clothes expenses during the tax year, and that he had discussed each of these items with petitioner (Tr. 57-60).

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[1]"G.X." refers to the government's exhibit number at trial.

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During its deliberations, the jury returned to the courtroom and asked the following question (Tr. 156):

> Did Sarah Coleman testify that the copy of her income tax [return] * * * did not have the gas deduction on it?

To avoid giving any portion of Coleman's testimony undue emphasis or reading it out of context, the court ordered that her entire testimony — in which she claimed that the gasoline tax deduction did not appear on her copy of the 1972 return — be read to the jury. The jury subsequently rendered verdicts of guilty on the two counts involving Coleman's tax returns and on the one count involving Dominiak's return. Petitioner was acquitted of fraudulently preparing the Burgos return (Tr. 157-158).

Subsequent to trial, it was determined that, contrary to Coleman's testimony, her copy of her 1972 income tax return did show the gasoline tax deduction. The district court therefore granted petitioner a new trial on both of the Coleman counts, but it refused to overturn the conviction on the Dominiak count (Pet. App. B).

2. The district court correctly ruled that the interests of justice did not require a new trial for petitioner on the Dominiak count.[2] See Fed. R. Crim. P. 33. Although Coleman's erroneous testimony could have influenced

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[2]Although petitioner suggests (Pet. 11) that "it is arguable that [government counsel] should have known the true contents" of Coleman's copy of her 1972 tax return, he does not contend, nor does the record indicate, that government counsel in fact knew of the inaccuracy of Coleman's testimony during trial. See *Pyle* v. *Kansas*, 317 U.S. 213. Nor is this a case in which the government learned of the falsity during trial but made no effort to correct it. See *Alcorta* v. *Texas*, 355 U.S. 28. Indeed, here *petitioner* presumably was fully aware during trial that Coleman's testimony was inaccurate, yet he never asked that her copy of her tax return be produced in order to settle the issue he now claims was crucial to the verdict.

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the jury's determination of whether petitioner had fraudulently prepared *her* return, petitioner failed to show how that testimony — which essentially related to Coleman's credibility—"could * * * in any reasonable likelihood have affected the judgment of the jury" on the Dominiak count. *Napue* v. *Illinois*, 360 U.S. 264, 271; see also *Giglio* v. *United States*, 405 U.S. 150, 154. The evidence adduced on each count was separate and distinct, consisting of the allegedly fraudulent tax return that formed the basis for the charge and the testimony of the taxpayer for whom the return was prepared. The offenses were interrelated only by their alleged commission during the conduct of petitioner's tax consulting business. Indeed, petitioner's acquittal on the Burgos count clearly indicates that the jury considered each charge separately.[3]

3. Nor is there merit to petitioner's contention (Pet. 6) that he was denied a fair trial by the court's decision to read Coleman's entire testimony (consisting of only 11 transcript pages) in response to the jury's question, rather than to submit to the jury the copy of the 1972 tax return itself. Determination of the proper method by which

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[3]Petitioner contends (Pet. 6-8) that Coleman's testimony about the contents of her copy of the return could have provided the jury with a theory as to how petitioner had filed the fraudulent returns without his clients' knowledge, and that the jury's request for a rereading of Coleman's testimony indicates that the acceptance of such a theory was crucial to the jury's verdict on all of the charges. Petitioner's theory, however, does not "rise * * * above the level of speculation," and certainly does not merit the relief requested. *Ross* v. *Texas*, 474 F. 2d 1150, 1153 (C.A. 5); *United States* v. *DeVoe*, 493 F. 2d 776 (C.A. 5). Moreover, this theory—which was never argued to the jury—fails to explain the jury's acquittal on the Burgos count. Finally, the unrebutted testimony at trial established that petitioner did not provide his clients with copies of their returns until several months after the returns were prepared and filed (Tr. 33, 57, 84-86), at which time few of the taxpayers could be expected to re-examine their tax status for the previous year. This provides a more plausible explanation for the clients' lack of awareness of petitioner's fraudulent conduct and, indeed, was the theory that the government argued to the jury (Tr. 139-1).

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to honor a jury's request to rehear evidence is addressed to the discretion of the court. *Allis* v. *United States*, 155 U.S. 117; *United States* v. *Chicarelli*, 445 F. 2d 1111, 1115 (C.A. 3). Here, the copy of Coleman's tax return had not been introduced into evidence, and the jury did not ask to see a copy of the return but only to rehear Coleman's testimony about it. Finally, petitioner raised no objection to the manner in which the court proposed to respond to the jury's inquiry.

4. Petitioner and his wife, Elinor Ganie, originally were charged with thirteen counts of preparing fraudulent tax returns and one count of conspiracy to commit those offenses. This indictment was read to the venire during *voir dire* (Tr. 3-A to 3-D). After the jury had been sworn but prior to commencement of the trial, the government moved to dismiss the indictment against Elinor Ganie and to dismiss all but five of the substantive counts against petitioner.[4] The motion was granted without objection (Tr. 6-7).

Petitioner contends (Pet. 13-14) that the lengthy original indictment predisposed the jury "to believe that the petitioner had done something wrong being accused of doing the same thing fourteen different times" (Pet. 14) and that the prosecutor's motion to dismiss several of the counts at the outset of the trial was calculated to impress the jury with the government's generosity and the strength of the remaining charges. The motion to dismiss was in full accord with Rule 48(a) of the Federal Rules of Criminal Procedure, however, and there is no basis in the

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[4]The court dismissed one of the remaining counts at the end of the government's case (Tr. 66-67). Although petitioner intimates (Pet. 14) that he was prejudiced because the jury was not told of this dismissal until after he testified, the court delayed in informing the jury only because of petitioner's explicit assent to that procedure (Tr. 70).

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record for petitioner's allegations of bad faith. Significantly, petitioner raised no objection to the dismissal at the time, nor did he either suggest a specific cautionary instruction to the jury or move for a mistrial on the remaining counts. Moreover, the trial court advised prospective jurors during *voir dire* (Tr. 3-D), and instructed the jury prior to its deliberations (Tr. 144), that an indictment was not evidence and could not give rise to any inference of guilt. Although petitioner speculates on the possible effect that the dismissal may have had on the jurors, it is equally plausible — and equally speculative — that the dismissal was interpreted by the jury as a sign of weakness of the government's proof.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.